NO. 95905-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

LEONEL ROMERO OCHOA,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stanley J. Rumbaugh, Judge

RESPONDENT'S ANSWER TO AMICUS BRIEF FILED BY NORTHWEST JUSTICE PROJECT ET AL. (CORRECTED)

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A. ARGUMENT

1. THE SIXTH AMENDMENT RIGHT TO CONFRONTATION IS A CORNERSTONE OF OUR SYSTEM OF JUSTICE. PREVENTING THE JURY FROM HEARING EVIDENCE OF THE KEY WITNESS'S BIAS VIOLATES THAT RIGHT.

a. Evidence of witness bias has always been subject to cross-examination because it is highly probative of credibility, and there is no basis to treat a specific form of bias associated with immigration status differently.

Amicus takes an extreme position. It calls for an exception to the right to confront witnesses with evidence of bias when associated with immigration status. Courts have never carved out an exception to the constitutionally mandated rule permitting the accused to impeach a witness with evidence of bias. The Confrontation Clause does not permit examination on some forms of bias while preventing others from being presented to the jury. If there is evidence of bias, whatever its form, and it is harbored by a chief prosecution witness, the Sixth Amendment right to confrontation demands the defendant be permitted to cross-examine the witness about it.

"[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Pointer v. Texas, 380 U.S. 400, 405, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). A core value of the Confrontation

Clause "is the ability to expose a witness's motivation for testifying." United States v. Recendiz, 557 F.3d 511, 530 (7th Cir. 2009). The Confrontation Clause is violated when a defendant is prevented "from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (quoting Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110, 39 L. Ed. 2d 347 (1974)).

The accused has the constitutional right to present relevant evidence in support of a defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "Generally, evidence is relevant to attack a witness' credibility or to show bias or prejudice." State v. Lee, 188 Wn.2d 473, 488, 396 P.3d 316 (2017). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." United States v. Abel, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).

Bias comes in different forms. One form of bias is a witness's self-interest. Abel, 469 U.S. at 52. A particular form of bias — self-interest in

obtaining a U-Visa — does not cease to be probative of witness credibility simply because it pertains to immigration status. A "specific bias or motive to lie" is "highly probative." Lee, 188 Wn.2d at 488. A witness's interest in obtaining a U-Visa is a specific bias because it cannot be obtained unless the witness is deemed the victim of certain crimes, thus motivating the witness to portray herself as such. 8 C.F.R. § 214.14(a)(9). Further, the witness is motivated to curry favor with the prosecution and testify in a manner that will secure the prosecution's goal of conviction because it is a prerequisite that an official certify that the U-Visa applicant has provided helpful assistance. 8 C.F.R. § 214.14(b)(3). "One can readily see how the U-Visa program's requirement of 'helpfulness' and 'assistance' by the victim to the prosecution could create an incentive to victims hoping to have their U-Visa's granted. Even if the victim did not outright fabricate the allegations against the defendant, the structure of the program could cause a victim to embellish her testimony in the hopes of being as 'helpful' as possible to the prosecution." Romero-Perez v. Commonwealth, 492 S.W.3d 902, 906 (Ky. Ct. App. 2016).

Amicus describes cross-examination about immigration status as a collateral matter. Brief at 6. It can be collateral. It depends on the case. But evidence of witness bias in a criminal case is never a collateral matter. See 1 McCormick On Evid. § 39, Bias and partiality (7th ed.) ("facts

showing bias are considered so highly probative of credibility that they are never deemed 'collateral'"); State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980) ("Even though evidence which establishes the bias of a witness does impeach the witness, such evidence is not considered impeachment on a purely collateral matter."). There is no reason to treat bias connected to immigration status any differently.

"[E]very defendant is entitled to a presumption of innocence, which is overcome only when the State proves guilt beyond a reasonable doubt as determined by an impartial jury based on evidence presented at a fair trial." State v. Walker, 182 Wn.2d 463, 480, 341 P.3d 976 (2015). The premise underlying amicus's argument, however, is that the complaining witness has been the victim of a crime and that the accused has committed the crime. From this flawed premise, the confrontation clause appears to be a technicality or, worse, an impediment to truth and justice. The right to confront witnesses draws life from the presumption of innocence. When a witness takes the stand, the credibility of her testimony is judged by the trier of fact. One thing the jury must be able to consider is any bias the witness harbors. Completely barring cross-examination on a witness's bias deprives the jury of crucial evidence needed to a fair assessment of that witness's credibility and, ultimately a

fair assessment of whether the State has overcome the presumption of innocence and proven its case beyond a reasonable doubt.

b. Political climate does not, and should not control, the exercise of fundamental rights in a court of law.

Amicus says evidence of immigration status is highly prejudicial in today's political climate. Brief at 12. The right to confrontation has been enshrined in the constitution for over two centuries. Enforcement of the confrontation clause does not depend on the vagaries of the political climate. Presidents and their administrations come and go. The right to confrontation endures. Government policies change with the prevailing political wind. The Sixth Amendment right to confrontation holds fast. That the accused must be given a full and fair opportunity to cross-examine adverse witnesses for bias is an immutable principle. Brinson v. Walker, 547 F.3d 387, 393 (2d Cir. 2008).

The irony is lost on amicus. We currently have a president widely regarded as having contempt for the rule of law. A president who mocks the courts and the vital role they play in a civil society. And amicus's suggested response is to undercut one of the fundamental tenants of the criminal justice system? Just when protection of fundamental constitutional rights is most needed, amicus advocates for the erosion of one. At a time when the rule of law is more in danger than ever from

forces outside the judicial branch, the answer is for the courts to rigorously enforce the rule of law, not compromise it.

c. The constitutional right to present a defense and to confront witnesses required that Ochoa be allowed to cross-examine Isidor about her pending U-Visa application, and the trial court's ruling prohibiting him from doing so was unjustified in light of the rights at stake.

The State, the actual party in this case, did not seek review of that part of the Court of Appeals' decision holding the trial court erred in precluding Ochoa from cross examining the witness about her bias. The State knows when it's beat. Amicus, however, claims evidence that the chief prosecution witness was biased was too prejudicial to be presented to the trier of fact. Its argument is long on rhetoric and short on law.

This Court has established a legal framework for assessing admission of defense evidence. First, the evidence must be relevant. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Once relevance is established, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Id. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be excluded only "if the State's interest outweighs the defendant's need." Id.

Amicus does not contend evidence of Isidor's interest in the U-Visa was irrelevant to her credibility. Nor could it. "The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Davis, 415 U.S. at 316. Evidence of a chief witness's bias connected to the case at hand is highly probative. Lee, 188 Wn.2d at 488.

Amicus advocates for an approach to assessing prejudice that is contrary to precedent. It says the Confrontation Clause requires consideration of whether cross-examination will be used to intimidate and expresses concern that addressing a witness's undocumented status in court will dissuade such witnesses from testifying. Brief at 18-19.

"The issue is not whether evidence is prejudicial in the sense that it is detrimental to someone involved in the trial. *Rather, the question is whether the evidence will arouse the jury's emotions of prejudice, hostility, or sympathy.*" State v. Hudlow, 99 Wn.2d 1, 12-13, 659 P.2d 514 (1983) (quoting State v. Hudlow, 30 Wn. App. 503, 509-10, 635 P.2d 1096 (1981) (quoting J. Tanford & A. Bocchino, Rape Victim Shield Laws and the Sixth Amendment, 128 U.Pa.L.Rev. 544, 569-70 (1980)). Thus, "the balancing process should focus not on potential prejudice and embarrassment to the complaining witnesses, but instead should look to potential prejudice to the truthfinding process itself." Hudlow, 99 Wn.2d

at 13. A complaining witness cannot be protected at the expense of a defendant's right to a fair trial. Id.

Amicus complains "[a] defense attorney can destroy the victim's credibility simply by appealing to bias against undocumented immigrants." Brief at 7. Impeaching a witness by exposing an interest in seeking U-Visa relief is not an appeal to bias against undocumented immigrants. It is an exercise of the right to confront the witness by exposing that witness's bias. To equate the exercise of the right to confrontation through cross-examination with a naked appeal to nationalist prejudice betrays a grievous misconception of the role this right plays in ensuring a fair trial for the accused. "A defendant has a right to cross examine the State's witness concerning possible self-interest in cooperating with the authorities." State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537, review denied, 94 Wn.2d 1021 (1980).

"The trial court retains the authority to set boundaries regarding the extent to which defense counsel may *delve into* the witness' alleged bias 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'" State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (quoting Van Arsdall, 475 U.S. at 679) (emphasis added). But Ochoa's case is not one in which the trial court

merely limited the scope of questioning about bias by preventing him from delving too deeply into the matter. Rather, the court precluded Ochoa from cross-examining the witness about her bias altogether. While a defendant does not have the put specific facts before the jury, a defendant does have the right to put "specific reasons motivating the witness' bias before the jury." Fisher, 165 Wn.2d at 752-53 (citing State v. Brooks, 25 Wn. App. 550, 551-52, 611 P.2d 1274 (1980)).

Contrary to amicus's assertion, Ochoa does not advocate for a rule that every undocumented immigrant has a motive to lie on the stand and can be cross-examined about the U-Visa. Brief at 10. Ochoa's argument focuses on the facts of his case: (1) the witness knew about the U-Visa before the alleged crime took place and before she spoke to anyone about what allegedly happened; (2) she was interested in obtaining this benefit; (3) she submitted, through her lawyer, a request for certification from the prosecutor's office that she was cooperative, a prerequisite to obtain a U-Visa; (4) the prosecutor's office told her it would review her request after Ochoa's trial was finished; (5) she was the chief witness against Ochoa; and (6) there was no other evidence of bias available to impeach her testimony. The witness's bias is connected with the facts of Ochoa's case.[1]

[1] It is not Ochoa's position that every undocumented immigrant witness is subject to cross-examination about the U-Visa. At minimum, (1) the

"[N]o State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value." Jones, 168 Wn.2d at 721. If the form of bias happens to be self-interest in securing a form of immigration relief, then so be it. Government witnesses have no immunity from facing hard questions. Having chosen to take the stand, their testimony must be rigorously tested. Undocumented immigrant witnesses are not exempt from a requirement imposed on other witnesses.

Comparison with other confrontation cases is instructive. In Lee, where no confrontation error was found, a "prior false rape accusation had minimal probative value because it did not directly relate to an issue in the case." Lee, 188 Wn.2d at 488. "Evidence intended to paint the witness as a liar is less probative than evidence demonstrating a witness' bias or motive to lie in a specific case." Id. at 489. Unlike Lee, here there is evidence that the chief prosecution witness had a bias directly connected with Ochoa's case.

"Bias includes that which exists *at the time of trial,* for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy *while the witness was*

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witness must know the U-Visa exists as a form of relief; (2) the witness must qualify as a "victim" as that term is define by federal regulation; and (3) the alleged offense must be a qualifying crime under the federal regulation. Ochoa leaves for another day the outer contours for admitting this evidence in other cases with different facts.

testifying." Fisher, 165 Wn.2d at 752 (quoting State v. Dolan, 118 Wn. App. 323, 327-28, 73 P.3d 1011 (2003)). Isidor's U-Visa application remained pending in the prosecutor's office while that same office prosecuted Ochoa for the charged crimes. Through effective cross-examination, the defense would have been able to show the U-Visa application provided a strong motive for Isidor to falsify or embellish her account of what happened. By providing helpful evidence to the prosecutor's office, the witness increased the likelihood that the prosecutor's office would sign off on her U-Visa, clearing the way for it to ultimately be granted by the federal authorities. This is evidence of a specific bias existing at the time of trial.

In Fisher, a child abuse case, the trial court prohibited the defendant from asking Ward, his ex-wife, certain questions about their past divorce proceedings. Fisher, 165 Wn.2d at 751. There was no confrontation cause violation because, although the trial court excluded evidence of the financial details of the divorce, it did allow counsel to elicit testimony from Ward about the prolonged nature of the divorce and whether she harbored ill will toward the defendant. Id. at 753. In that manner, "the jury was apprised of the specific reasons why Ward's testimony might be biased." Id. Further, the evidence Fisher sought to admit was speculative and remote because it involved details of their

divorce that transpired long before the disclosure of abuse, the issue at trial, occurred. Id. Ward was not a key witness for the defense. Id.

The opposite features are present in Ochoa's case. The trial court did not allow any inquiry at all into a specific reason why Isidor's testimony was biased. There was nothing remote, vague, or speculative about the evidence Ochoa sought to elicit. Isidor knew about the U-Visa, having unsuccessfully applied for one before. She began the process of applying for another U-Visa in connection with Ochoa's case. She expressed her self-interest in securing this form of relief. Finally, Isidor was the prosecution's star witness. "A defendant enjoys more latitude to expose the bias of a key witness." Fisher, 165 Wn.2d at 752.

Amicus points to the rape shield statute, analogizing immigration status to sexual activity of a witness. Both are sensitive topics. But the comparison reveals the infirmity in amicus's position. In Jones, for example, the trial court excluded the defendant's testimony that the complaining witness consented to sex during an all-night drug-induced sex party. Jones, 168 Wn.2d at 721. This violated the right to present a defense because the evidence, if believed, provided a defense to the charge. Id. at 721. "[T]he rape shield statute cannot be used to bar evidence of high probative value." Id. at 722. The Sixth Amendment takes precedent. Id. at 723 (citing Hudlow, 99 Wn.2d at 16).

Evidence of sexual history may be inadmissible under ER 403 when it is of low probative value. Lee, 188 Wn.2d at 493-94. And the State has a compelling interest in encouraging rape victims to report and cooperate in prosecuting sex crimes. Id. at 495. This does not mean that all such evidence is always excluded. Rather, it means evidence that bears "no direct relationship to the issues in the case" may be excluded. Id. at 495. Isidor's attempt to secure a U-visa, using her allegations against Ochoa as the means to do so, has a direct relationship to his case.

Amicus offers no affirmative example of when, in its view, cross-examination on the U-Visa would ever be permitted. At most, it obliquely suggests there must be evidence that a victim is actually receiving immigration relief. Brief at 1. But then elsewhere says it takes years before a U-Visa application is granted, in which case such evidence, under amicus's view, would never be available to show bias because such relief is never secured at the time of trial. Brief at 16-17. Moreover, if the witness has already received the immigration benefit, then there would no longer be a motive to fabricate testimony in order to receive one. It is the desire to obtain relief that provides the motive to fabricate. See State v. Buss, 76 Wn. App. 780, 788 n.3, 887 P.2d 920 (1995) (evidence of bias shown where witness *intended* to file a civil lawsuit against the defendant

based on alleged crime, but had not yet done so), abrogated on other grounds by State v. Martin, 137 Wn.2d 774, 975 P.2d 1020 (1999).

Amicus complains the defense offered no proof Isidor actually applied for a U-Visa. Brief at 18. That is splitting hairs. Her attorney submitted a request for certification from the prosecutor's office, an integral and necessary component of the U-Visa application and one which would not have been made had she not been intent on seeking this form of immigration relief.

Amicus talks about "unauthenticated hearsay evidence" that Isodor "might have been applying for a U visa." Brief at 18. Hearsay rules do not apply to preliminary offers of proof. In re Detention of H.N., 188 Wn. App. 744, 751, 355 P.3d 294 (2015). And lawyers act as agents for their clients and so the request for certification from the prosecutor's office is imputed to Isidor herself. See West v. Thurston Cty., 168 Wn. App. 162, 183, 275 P.3d 1200 (2012) ("the attorney-client relationship is generally a type of principal-agent relationship"); Haller v. Wallis, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) ("The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on his behalf."). Further, evidence of bias needs no extrinsic evidence. A witness can simply be questioned about the matter, with extrinsic evidence an additional option if

the witness makes a denial. State v. Spencer, 111 Wn. App. 401, 409, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009, 62 P.3d 889 (2003).

Amicus says there was no proof Isidor was in danger of being deported (Brief at 18), after going on elsewhere about how undocumented immigrants live in constant fear of being deported. Brief at 12-14. It is a matter of common knowledge that undocumented immigrants are afraid of being deported. The fear is always there, which means there is a motivation to seek a form of immigration relief to secure legal residence. Amicus says the applicant is not guaranteed relief. That does not make the witness's interest in securing the relief any less probative. What counts is the witness's motivation.

Courts must be careful not to usurp the function of the jury. The jury, as finder of fact, is entitled to assess evidence of bias, which bears on the accuracy and truth of a witness's testimony. Abel, 469 U.S. at 52. No exceptions are made for certain kinds of evidence bearing on the accuracy or truth of a witness's testimony. Whether the witness is actually biased is for the jury to decide. See Buss, 76 Wn. App. at 788 ("The issues of credibility and the weight to be given to evidence of [the witness's] bias was for the jury to decide, not the court.").

d. The Confrontation Clause makes no exception for sensitive topics.

This Court has recognized immigration "[i]ssues involving immigration can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 672, 230 P.3d 583 (2010). In Silas, evidence of a party's undocumented status was properly excluded because it had low probative value based on the issues in the case. Id. Salas is not a criminal case, where fundamental rights are at stake, nor is it a case involving the bias of a chief witness.

A defendant must be allowed to conduct reasonable cross-examination on a subject relevant to the witness's motive to lie, even if the subject matter is potentially inflammatory to the jury. Olden v. Kentucky, 488 U.S. 227, 232, 109 S. Ct. 480, 102 L. Ed. 2d 513 (1988). Issues of race are just as sensitive as issues of immigration. In Olden, speculation as to the effect of jurors' racial biases did not justify exclusion of evidence showing a motive to falsify testimony on cross-examination. Id. at 232.

For another example, consider evidence that a government witness harbors racial animosity toward the defendant. See United States v. Figueroa, 548 F.3d 222, 227-30 (2d Cir. 2008) (trial court violated right to confrontation in precluding the defendant, a member of a minority group,

from questioning a government witness about his swastika tattoos); Brinson, 547 F.3d at 393-95 (exclusion of evidence that the white complainant expressed racist feeling toward black defendant violated the confrontation clause). No doubt such evidence can inspire passionate responses, just as there is no doubt such evidence permits the jury to draw adverse inferences about the witness's credibility.

The approach advocated by amicus reflects a distrust for the ability of jurors, vetted by the voir dire process, to follow their oath and decide the case fairly in accord with the court's instructions. What is lost on amicus, but what this Court should not lose sight of, is that the voir dire engaged in by defense counsel on the issue of immigration was counsel's attempt to ensure that the jury could be fair and impartial toward Ochoa. 4RP 54-62. Defense counsel was attempting to find out if anyone would treat his client differently because he was an immigrant. And not one member of the venire so much as suggested that he or she would treat an immigrant differently in a court of law. Not one said he or she could not follow the court's instructions. 4RP 54-62, 92-94. Neither side attempted to excuse these jurors for cause. Jurors can have strong opinions about immigration, but that does not mean those jurors are unable to be fair and impartial.

e. Amicus draws specious connections.

Amicus says undocumented immigrants are afraid of having their unlawful presence revealed and will be dissuaded from testifying if their unlawful presence is revealed through questioning about the U-Visa. Brief at 1. The argument is self-defeating. The U-Visa is a form of federal relief specifically available to those seeking lawful permanent residence. 8 U.S.C. § 1255(m). Any witness, by pursuing a U-Visa application, necessarily reveals her undocumented status to the federal government. Being cross-examined on the topic in court changes nothing in that regard. The suggestion that admitting U-Visa evidence in court will dissuade witnesses from testifying because it will reveal unlawful presence therefore falls flat. Indeed, in Ochoa's case, the witness had previously filed for U-Visa relief based on an unrelated incident but was denied. 3RP 91-93. The federal government already knew about her undocumented status as a result of that prior application long before Ochoa's case came along.

Amicus also contends admitting this evidence in court undermines the U-Visa program. Brief at 5. Allowing cross-examination about the U-visa in court does nothing to dissuade people from applying for one. If the application is granted, then they secure legal status and are protected from

deportation. The availability of cross-examination on the matter does not affect the application.

Amicus is particularly concerned that domestic violence perpetrators use the threat of deportation against the partners they abuse. Brief at 3-4. If such abusers threaten deportation, the threat exists regardless of whether the topic of a U-Visa is addressed in cross-examination at trial. As described by amicus, batterers tell their partners they will be deported if they call police. Brief at 5. Such out-of-court threats have nothing to do with the admissibility of evidence. If the threat already exists, admitting U-Visa evidence creates none.

f. ER 413 is inapplicable to Ochoa's case, but to the extent his case offers guidance on how the rule should be applied in the future, allowing cross-examination is consistent with the rule.

Amicus says the Court of Appeals' decision undermines ER 413. Not true. ER 413 does not even apply to Ochoa's case. The rule was not in effect at the time of Ochoa's trial. The Court of Appeals therefore did not apply the rule. In any event, the rule expressly allows evidence of a witness's immigration status "to show bias . . . of a witness" in a criminal case. ER 413(a). The rule incorporates a standard already established by this Court's precedent: "The court may admit evidence of immigration status to show bias or prejudice if it finds the evidence is reliable and

relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status." ER 413(a)(4). Nothing in the rule "shall be construed to exclude evidence that would result in the violation of a defendant's constitutional rights." ER 413(a)(5). The rule reflects the standard developed in case law over the years for when evidence relevant to present a defense is admissible.

The fairness of the fact-finding process is enhanced, not diminished, when the jury is permitted to hear evidence that the government's primary witness has a motivation to lie or embellish. "Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded." Lee, 188 Wn.2d at 487 (quoting Darden, 145 Wn.2d at 620). Ochoa asks for no less.

B. CONCLUSION

For the reasons stated, Ochoa requests that this Court affirm the Court of Appeals and remand for a new trial on the reversed counts.

DATED this 14th day of January 2019

Respectfully Submitted,

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